No. 18,839

United States Court of Appeals

For the Ninth Circuit

ZIEGLER CHEMICAL AND MINERAL CORPORATION, a corporation,
Plaintiff, Cross Defendant and Appellant,

vs.

AMERICAN GILSONITE COMPANY, a corporation,
Defendant, Cross Complainant and Appellee.

APPELLEE'S BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal by plaintiff and cross defendant Ziegler Chemical and Mineral Corporation from a summary judgment for the payment of $9,136, entered in favor of defendant and cross complainant, American Gilsonite Company, on the first and second causes of action stated in American's counterclaim.[1]

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[1]Appellant and Appellee will sometimes hereafter be referred to, respectively, as "Ziegler" and "American." "Tr." refers to the Clerk's Transcript; "O.B." refers to Appellant's Opening Brief. Inasmuch as the first and second causes of action of the counterclaim are all that is involved in this appeal, we will sometimes refer to them as "the counterclaim" collectively.

The action in which the counterclaim was asserted was commenced by Ziegler on April 12, 1962, against American and certain other defendants for injunctive relief and treble damages under the antitrust laws, and a declaration of the invalidity of American's patent (Tr. 1 ff.). With its answer, which denied all material allegations of the complaint, American filed a counterclaim, stating several claims for relief (Tr. 45-49), including the two involved in this appeal. The first and second causes of action of the counterclaim sought the same relief on alternative theories of liability and alleged, respectively, an account stated in the amount of $9,136 owing from Ziegler to American, and a promise by Ziegler, supported by valuable consideration, to pay such amount to American, and that Ziegler had not paid any part of such amount (Tr. 45-47). Those causes of action are the only causes of action involved in this appeal. Ziegler's reply to the counterclaim admitted the execution of certain documents, admitted demand and nonpayment, and generally denied the balance of the allegations (Tr. 62-65). American then moved for summary judgment on the first and second causes of action of its counterclaim. The Trial Court granted the motion and directed entry of judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure (Tr. 100). This appeal followed.[2]

The trial court jurisdiction was based upon 15 U.S.C. 15 and 28 U.S.C. 1337. Jurisdiction of this Court is based upon 28 U.S.C. 1291 and 1294.

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[2]Enforcement of the judgment was stayed pending the conclusion of the main action on condition that Ziegler file a bond (Tr. 105).

STATEMENT OF THE CASE

Both Ziegler and American mine and sell gilsonite, a natural asphaltic substance found in the Uintah Basin in Utah and Colorado. Since 1954, American has been the owner of a patent on the use of gilsonite in insulating underground hot pipes (Tr. 13, 18). American immediately offered to license that patent to Ziegler upon substantially the same terms that Ziegler subsequently accepted in 1958 (Tr. 71). Ziegler refused to agree to those terms, but American kept its offer open, conditioned on Ziegler's agreement to pay equivalent "back royalties" on sales prior to execution of the agreement (Tr. 71). Early in 1958, American finally sued two of Ziegler's customers for patent infringement and obtained judgments in both cases (Tr. 72).[3]

While American's infringement actions were pending, Ziegler sought American's assurance that, on payment of royalties, American would not sue Ziegler's customer, Esso Standard Oil Company. American refused unless Ziegler would execute the license agreement for the future and promise to pay equivalent so-called "back royalties" on past sales (Tr. 72).

On April 10, 1958, Ziegler executed an agreement with American, obligating it to pay a royalty of $8 per ton of gilsonite to be sold for use in practicing American's patent, and allowing Ziegler to authorize its customers to practice the patent (Tr. 18-20). On the same date, Ziegler wrote a letter to American stating Ziegler's willingness to pay back royalties (Tr. 74). American promptly

[3]This is the same patent that Ziegler contends in the main action is invalid (Tr. 13-15).

lived up to its promise and assured Esso that Ziegler's payments would remove any infringement of American's patent (Tr. 75). On December 15, 1958, Ziegler wrote to American stating that the amount of back royalties due was $9,136 and promising payment some time during January, 1959 (Tr. 79). American accepted this account as accurate and has never disputed it (Tr. 78).

By letter of January 12, 1962, American terminated the license agreement because Ziegler had breached it in several respects (Tr. 32-34).[4]

American's counterclaim and its motion for summary judgment were based upon the two letters from Ziegler to American, the authenticity of which was admitted by Ziegler,[5] and on the affidavits of E. F. Goodner, American's former president (Tr. 70-75) and of Earl H. Owen, American's Secretary-Treasurer (Tr. 76-79). The first letter, dated April 10, 1958, stated (Tr. 74):

> "Mr. E. F. Goodner, President
> American Gilsonite Company,
> 134 West Broadway,
> Salt Lake City 1, Utah.
>
> Dear Ernie:
>
> "In line with our telephone conversation just now this is to confirm our willingness to pay you back royalties wherein we sold Gilsonite for underground pipe insulation.

---

[4]A similar agreement covering American's foreign patents which had been executed sometime after 1958 (Tr. 22-25) was terminated for the same reason at the same time.

[5]The letter of December 15, 1958, was pleaded in American's answer and counterclaim (Tr. 46, 61) and expressly admitted by Ziegler (Tr. 63). The letter of April 10, 1958, attached as an exhibit to the affidavit of Goodner (Tr. 74), was not denied in the affidavits filed in opposition to the motion for summary judgment.

"I appreciate you [sic] willingness to give us a little time to do this and we will offer a payment plan for your approval shortly.

"Yours very truly,
G. S. Ziegler and Company
Gordon
G. S. Ziegler
General Manager"

The precise amount of the back royalties Ziegler agreed to pay by that letter and his "payment plan" were contained in Ziegler's letter of December 15, 1958, to Mr. E. H. Owen, American's Secretary-Treasurer. That letter stated (Tr. 79):

"Mr. E. H. Owen, Secretary-Treasurer
American Gilsonite Company
134 Broadway
Salt Lake City 1, Utah

Re: Patent 2,668,125

Dear Mr. Owen:

"At long last we have completed our work with regard to determining the back royalties due you under the above patent.

"According to our records, the total comes to $9,136.00 covering the period 1954 to the end of February, 1958, since which time, as you know, we have been reporting and paying monthly. Our yearly tonnage figures were as below:

1954	40	tons at $8	$ 320.00
1955	28	"	224.00
1956	180	"	1,440.00
1957	773	"	6,184.00
1958	121	"	968.00
	1,142		$9,136.00

"What with all the expenses incurred this year with respect to our TRI-SUL-ITE Division, we would like to defer putting these back royalties on our books until next year, and for which reason we hope you will not mind our setting this up for payment in January of next year.

"With our best wishes for a MERRY CHRISTMAS and a HAPPY NEW YEAR, I am

"Very truly yours
G. S. ZIEGLER & COMPANY
O. G. Clement
O. G. Clement
Sales Manager"

In opposition to American's motion for summary judgment, Ziegler filed affidavits of G. S. Ziegler, plaintiff's president and general manager (Tr. 80 ff.), and O. G. Clement, plaintiff's vice president and general sales manager (Tr. 98). Neither affidavit disputed any material fact set forth in the two affidavits filed by American, and accordingly the court below granted a summary judgment in favor of American, stating in part in its memorandum of decision (Tr. 104):

"The Court finds and concludes from the record that there is no genuine issue of fact involved in the issue raised by the first and second causes of action of the counterclaim, that the record clearly shows without conflict an agreement of Ziegler to pay the so-called back royalties and that an account has been stated as to the amount due thereunder, $9,136, and that there is no just reason for delay in entry of judgment thereon."

QUESTION PRESENTED

The question presented on this appeal is whether, on the basis of the pleadings and the affidavits on file herein, the Trial Court correctly concluded that no genuine issue of fact existed with regard to American's claim for payment of $9,136, and that, as a matter of law, American was entitled to judgment in this amount.

SUMMARY OF ARGUMENT

American's affidavits together with the letters of April 10 and December 15, 1958, unquestionably establish both an account stated and a promise by Ziegler supported by valuable consideration to pay the back royalties to American. The authenticity of the letters is not disputed and Ziegler has admitted that it has not paid the amount agreed upon.

Ziegler's attempt in its affidavits to vary the express terms of the written promises cannot create any disputed question of fact because such evidence could be inadmissible as a violation of the parol evidence rule. Ziegler's state of mind and its subjective feelings and reactions are irrelevant, and appellant's arguments based thereon cannot detract from the express terms of its written promises. Likewise, the claim of invalidity of American's patent is irrelevant because such a claim, even if true, does not detract from the consideration received by Ziegler in return for its express promise to pay the back royalties.

ARGUMENT

The letters by Ziegler to American of April 10 and December 15, 1958 (Tr. 74, 79), set forth in full above, together constitute a clear, unambiguous and unconditional promise in writing to pay a sum certain, $9,136, on or before a date certain, the end of January, 1959. The second of these letters also constitutes an account stated and accepted by American.

Appellant's argument consists solely of attempts to impugn the clear and unambiguous wording of these letters and to raise factual issues not supported by the record.

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1. ZIEGLER CANNOT SHOW THAT HIS UNCONDITIONAL WRITTEN PROMISE TO PAY WAS SUBJECT TO ANY ORAL CONDITION RELATING TO AN OFFSET.

Ziegler argues (O.B. 13) that in the negotiations leading to the writing of the letters, Ziegler claimed that the amounts due American were to be reduced by claims of Ziegler for alleged harassment by American of Ziegler's customers. But the parts of the affidavits filed on behalf of Ziegler, referring to the letter of December 15, 1958, state only:

> "That the aforesaid figures were subject to an offset for expenses caused to plaintiff by defendant as the result of the foregoing harrassment [sic] of plaintiff and his customers" (Tr. 82).

> "That at no time did plaintiff intend these figures as an account stated since plaintiff well knew, and so informed defendant, that considerable sums were due to plaintiff from defendant growing out of the same

transactions, also as set forth in affidavit of GORDON S. ZIEGLER, herewith'' (Tr. 99).

Neither of these statements supports the argument in Appellant's brief that there was a prior or contemporaneous oral agreement that there would be any offset to the amount Ziegler promised to pay in those letters. But even if these statements could be so construed, such a claim would be in direct conflict with the clear and unambiguous wording of the written promise to pay. The Trial Court properly disregarded any attempt by Ziegler to impeach its own writing by allegations of prior or contemporaneous parol understandings. On motions for summary judgment allegations in affidavits which would not be susceptible of proof at trial must be disregarded.

Gillis v. Miners and Merchants Bank of Alaska (9 Cir. 1959) 271 F.2d 163;

Ford v. Luria Steel & Trading Corp. (8 Cir. 1951) 192 F.2d 880.

Thus, even if the affidavits filed by Appellant had set out facts showing an oral agreement or condition of offset—which they do not—such averments would be ineffective as an attempt to impeach a written unconditional promise to pay.

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2. THE CLAIM THAT CONSIDERATION FOR THE PROMISE FAILED IS WHOLLY WITHOUT MERIT. ZIEGLER RECEIVED EXACTLY WHAT HE BARGAINED FOR.

G. S. Ziegler's affidavit states that Ziegler's promise to make the payment of ''back royalties'' was conditioned on, and had for its consideration, defendant's ceasing its

alleged harassment of plaintiff's customers and that defendant did not cease such harassment (Tr. 82). As already shown, Ziegler cannot, by averments or oral side agreements or conditions, impugn the plain and unambiguous wording of its unconditioned written promise. If these averments sought to raise the defense of failure of consideration, they fail because Ziegler did not plead facts raising such an affirmative defense in its reply (Tr. 63) as required by Rule 8(c) of the Federal Rules of Civil Procedure. Thus, any such defense has been waived.

Fed. Rules Civ. Proc., Rule 12(h);

See:

Sorenson v. United States (9 Cir. 1955) 226 F.2d 460;

Kaye v. Smitherman (10 Cir. 1955) 225 F.2d 583, 594, certiorari denied (1955) 350 U.S. 913.

More important, however, the affidavits of G. S. Ziegler and Clement do not controvert the statement in Goodner's affidavit that American conditioned the execution of the license agreement of 1958 and the sending of the letter to Ziegler's customer, Esso, on Ziegler's promise to pay the "back royalties"; that Ziegler then executed the agreement and, on the same day, wrote American promising to pay the "back royalties"; and that American then sent the letter to Esso which Ziegler had requested (Tr. 72, 74, 75). Thus Ziegler received exactly what it bargained for.

These facts being undenied, the Trial Court was compelled to conclude that Ziegler's promise to pay the so-called "back royalties" was supported by valuable consideration and that no genuine issue of fact remained regarding the enforceability of Ziegler's promise.

3. THE APRIL 10 AND DECEMBER 15, 1958, LETTERS ESTABLISHED A PROMISE TO PAY A SUM CERTAIN BY A DATE CERTAIN.

Ziegler argues (O.B. 13-14, 19-20) that Goodner's affidavit does not show a promise by Ziegler to pay a specific amount. This argument is frivolous. The affidavits of Goodner and Owen must, of course, be read together. The December 15 letter stating precisely the amount of back royalties Ziegler previously promised to pay was addressed to "Mr. E. H. Owen, Secretary-Treasurer, American Gilsonite Company" (Tr. 79). Thus it was attached to Owen's affidavit. While Appellant characterizes Mr. Owen as an "underling" (O.B. 15), both the letter itself, and the affidavit of Owen, show that Owen, to Ziegler's knowledge, was then, and is now, an officer of American, namely, Secretary-Treasurer (Tr. 77).

Ziegler even claims (O.B. 14, 17-18) that the affidavit of Owen is hearsay with regard to Ziegler's promise to pay. Ziegler's promise is of course established by the written documents (Tr. 74, 79) attached to the affidavits. The conversation between Goodner and Owen (Tr. 77) related only the circumstances under which Owen, on behalf of American, wrote to Esso, Ziegler's customer (Tr. 75), to carry out Goodner's promise to Ziegler.

Thus, the Trial Court correctly considered the affidavits of Goodner and Owen, with their attached exhibits, together, and correctly found an unambiguous written promise to pay a sum certain on or before a date certain, on the basis of the letters from Ziegler to American of April 10 and December 15, 1958.

4. CLEMENT WAS AUTHORIZED TO WRITE THE LETTER OF DECEMBER 15, 1958.

Ziegler, in its brief (O.B. 14-15, 20) appears to contend that Clement was not authorized to sign the letter of December 15, 1958. The affidavits of G. S. Ziegler and Clement not only do not deny Clement's authority, but Clement's affidavit affirmatively states (Tr. 98) that he wrote the December 15, 1958, letter "at the request of plaintiff's then General Manager, Mr. Gordon S. Ziegler," and that he computed the figures contained in that letter at G. S. Ziegler's request (Tr. 80). In any event Appellant cannot now for the first time raise a spurious factual issue wholly outside the record.

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5. ZIEGLER'S LETTER OF DECEMBER 15, 1958, CONTAINING A PRECISE COMPUTATION OF BACK ROYALTIES DUE CONSTITUTES AN ACCOUNT STATED.

G. S. Ziegler's affidavit states that the letter of December 15, 1958, was only "an approximate computation" and was "merely tendered as an estimate" (Tr. 81); and Clement alleges that the letter of December 15, 1958, was never intended to be an account stated (Tr. 99).

An account stated has been defined as an

> "assent in good faith by debtor and creditor to a stated sum as an accurate computation of the amount of the matured debt or debts due the creditor * * *. A new duty arises to pay a sum so fixed" (Restatement, Contracts, sec. 422(1)).

Obviously, the debtor's secret intent that a writing, meeting on its face all requirements of an account stated,

should not have such effect is irrelevant. Even if Clement and Ziegler never heard of the concept of "an account stated" when the letter was sent, its legal effect must be judged by its contents—here an unequivocal determination of the back royalties due to American and a promise to pay the same.

That an account may be stated by the debtor as well as by the creditor is settled.

6 Corbin on Contracts (1962 Ed.) sec. 1313, pp. 268-270;

Kearney v. Bell (1911) 160 Cal. 661;

Linell v. Gordon (1920) 47 Cal.App. 691;

Cf. *Burnham v. Louis Meyers & Son* (2 Cir. 1949) 172 F.2d 84, 85.

The record establishes the prior written promise of April 10, 1958, by Ziegler to pay the so-called "back royalty" (Tr. 74). This promise is admitted by G. S. Ziegler's affidavit (Tr. 81) where he said: "plaintiff finally agreed to take a license under said patent and to pay such royalties on previous sales in amounts to be agreed upon by the parties." G. S. Ziegler's affidavit further recites that an exact determination of the royalties is difficult (Tr. 81). But the very purpose of an account stated is the striking of a balance upon a computation usually based on books of account, to which balance the parties then agree (see 6 Williston on Contracts (1938 Ed.) 5227-5228).

The letter of December 15, 1958, purported to set forth to Ziegler's satisfaction its computation, based on its own books and records (Tr. 79). That the computation is more than an "approximation" is apparent on its face. It did

not purport to round off any number but expressly stated to the exact ton the amount of gilsonite subject to royalty. The attempts of G. S. Ziegler and Clement to label this computation an approximation or estimate only (Tr. 98, 81, O.B. 22) contradict the express terms of the letter.

Finally, the letter of December 15, 1958, contains an express promise to pay the sum on or before a date certain. The contention (Tr. 81-82) that Ziegler's promise was merely to "put on the books" the amount due and that since Ziegler never put this amount on its books it does not owe it is preposterous. The promise in the letter to make the payment is clear and unambiguous.

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6. AMERICAN AGREED TO THE ACCOUNT STATED.

Appellant does not and cannot state that American ever expressly disagreed with or disputed the account stated. Appellant merely points to the assertions of G. S. Ziegler and Clement (Tr. 82, 98) that American did not "acquiesce" in Ziegler's computation because American attempted an audit of Ziegler's records pursuant to paragraph 3 of the patent license agreement (Tr. 53, 58). The report of American's auditors is attached to G. S. Ziegler's affidavit and speaks for itself. This report expressly states (Tr. 85) that American's instruction to its accountants was to audit *only royalty payments due under the written license agreement* of February 18, 1958 (executed by Ziegler on April 10, 1958), i.e., royalties due after the date of the license agreement. Thus, the back royalties stated in the December 15th letter were clearly outside the scope of the audit, and no inference can be drawn from that audit that American disputed the December

15th computation. On the other hand, the fact that American limited its audit to royalties due after the agreement was executed confirms the fact that it was satisfied with the computation set forth in Ziegler's December 15th letter.[6]

Similarly, the access to Ziegler's books and records demanded by American's letter of January 12, 1962, clearly related only to the audit under the license agreement which had been frustrated by Ziegler's refusal to make its records available (Tr. 95-97). In fact, this letter constitutes an express acceptance of the account stated, since it demands payment of

> "The amount of $9,136, said sum being the amount of the back royalties owing us in accordance with the account stated in your letter to us dated December 15, 1958" (Tr. 96).

Thus, the record shows without contradiction that American expressly assented to the account stated in Ziegler's letter of December 15, 1958. Ziegler states no facts from which a failure by American to acquiesce could be inferred.[7] On the facts revealed by the record,

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[6]Ziegler contends (O.B. 9-10, Tr. 82) with respect to the accountant's report that the amount reported therein is different from the amount alleged herein to be an account stated. This refers to the mention in the report of a $644 payment prior to March 1, 1958 (Tr. 93). That the accountants were in error in deducting this payment is confirmed by Ziegler's reply to the counterclaim, which expressly admits that no part of American's claim for $9,136 has been paid (Tr. 46, 47, 63). Furthermore the audit shows on its face that payments or obligations not arising out of the two written license agreements were not within the scope of the audit ordered by American.

[7]The claim that American did not demand payment for three years (O.B. 20) is not supported by the record, and in any event, an absence of an earlier demand is immaterial.

American's failure to object would in law have amounted to an acceptance long prior to American's letter of January 12, 1962. If American now disputed the correctness of Ziegler's computation of December 15, 1958, Ziegler could properly point out that American's failure to challenge the computation within a reasonable time constituted assent and barred American from challenging the correctness of the account.

See:

6 Corbin on Contracts (1962 Ed.) p. 270;

Restatement of Contracts, sec. 422(2);

Oil Co. v. Van Etten (1882) 17 Otto (107 U.S.) 325, 333-334 (holding a lapse of four to five months unreasonable);

Reed Research v. Schumer Company (D.C.Cir. 1957) 243 F.2d 602, 604;

Willard Helburn, Inc. v. Spiewak (2 Cir. 1950) 180 F.2d 480, 483.

Since assent implied from acquiescence results in the creation of a new obligation on the account stated, Ziegler, as well as American, was bound by the computation contained in the letter of December 15, 1958, when American retained the letter without protest for a reasonable period of time. This reasonable period would have expired long before the audit which took place late in 1961 and long before this action was commenced.

CONCLUSION

For the foregoing reasons we submit that the judgment of the court below on appellee's counterclaim must be affirmed.

Dated: San Francisco, California,
March 2, 1964.

Respectfully submitted,
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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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Attorney for Appellee.